(2)

No. 89-759

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANNA KOWALESKI, WIDOW OF PETER KOWALESKI, AND JAMES T. LESHO, ESQUIRE, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed a petition for review pursuant to Fed. R. App. P. 15 because it was not taken in the name of the real party in interest and because the motion to substitute parties was not timely filed.

2. Whether the court of appeals properly ordered that costs be taxed directly against James Lesho, as counsel for the "nominal appellant," when it dismissed a petition for review.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-13a) is reported at 879 F.2d 1173. The decisions of the Benefits Review Board and the administrative law judge (App., *infra*, 1a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989. A motion for rehearing was denied

on August 15, 1989 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Peter Kowaleski (the "miner") filed an application for benefits under the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, which provides benefits to coal miners (and eligible survivors) who are totally disabled or die due to pneumoconiosis that arose out of coal mine employment (Pet. App. 4a-5a; App., *infra*, 6a). In his application, the miner listed his wife, Anna Kowaleski, as his sole dependent (Pet. App. 5a). On June 10, 1979, while the claim was pending at the administrative level, Anna Kowaleski died (*ibid.*).

The Department of Labor denied the claim on its merits in 1983 (Pet. App. 5a), but granted the miner's request for a formal hearing. On March 1, 1985, while the case was pending, the miner died (*ibid.*). Charles Kowaleski, the executor of the miner's estate, authorized James T. Lesho, the miner's counsel for the black lung claim, to continue representation on behalf of the estate (*ibid.*).

On December 11, 1986, the administrative law judge issued a decision and order denying benefits (App., *infra*, 6a-14a). Although the administrative law judge erroneously named "Anna Kowaleski, widow of Peter Kowaleski" as the claimant in the caption to the order, counsel did not move to have this error corrected, and instead appealed the case to the Benefits Review Board in the name of and purportedly on behalf of the deceased Anna Kowaleski (Pet. App. 5a).

By order of August 31, 1988, the Benefits Review Board affirmed the administrative law judge's denial of benefits (App., *infra*, 1a-5a). Apparently confused by the captioning of the case, the Board incorrectly noted in its decision and order that the claim was being pursued by Anna Kowaleski (App., *infra*, 2a n.1). Anna Kowaleski had never authorized counsel to represent her interests, if any, in the matter (Pet. App. 6a).

2. On October 5, 1988, counsel filed a notice of appeal with the court of appeals, again on behalf of "Anna Kowaleski, Widow of Peter Kowaleski" (Pet. App. 6a). By letter of June 7, 1989, the court requested that counsel show cause why the case should not be dismissed for lack of an appealable order (*ibid.*). Counsel did not respond directly to the court's request, but filed a motion on June 12, 1989, to substitute Charles Kowaleski, the executor of the miner's estate, for Anna Kowaleski (*ibid.*).

The court of appeals denied the motion to substitute the executor and dismissed the appeal for lack of a real party in interest (Pet. App. 12a). The court noted at the outset that the petition for review lacked a real party in interest: Anna Kowaleski's or her estate's entitlement to black lung benefits depended on her surviving her husband, and she had in fact predeceased him (*id.* at 7a). The court relied on this Court's holdings, in an analogous context, that "the failure to name a party in a notice of appeal or to amend the notice within the time for filing an appeal deprives the court of appeals of jurisdiction over the unnamed parties." *Id.* at 8a, citing *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988). The court concluded that although *Torres* had concerned the mandates of Federal Rules of Ap-

pellate Procedure 3 and 4, "the same punctilious, literal, and exact compliance" was required "with the identical jurisdictional requirement in Rule 15 that the petition for review 'shall specify the parties seeking review' " (Pet. App. 10a). The court next determined that it could not acquire jurisdiction over the petition by granting the belated request to substitute the miner's executor for Anna Kowaleski. Even if the court were to construe the motion as a request to substitute the miner's executor for the interests of the miner (as opposed to the interests of Anna Kowaleski), the motion was not filed within the time limits for filing the original petition, and thus had to be denied under *Torres*. *Id.* at 10a-12a.

Finally, the court noted that its result stemmed "more from the ineptitude of the interested parties and their counsel than from the strictures of the jurisdictional prerequisites of Rule 15" (Pet. App. 12a; see also *id.* at 4a, 7a n.2, 10a n.3). The court taxed costs against James Lesho, counsel for the "nominal appellant" (*id.* at 12a).

ARGUMENT

The decision of the court of appeals to dismiss is correct and applies well-established principles to the particular facts of this case. Moreover, the court properly taxed costs directly against attorney James Lesho under Fed. R. App. P. 39, because no other person against whom costs could have been assessed was before the court.

1. Rule 15 of the Federal Rules of Appellate Procedure requires that a petition for appellate review of an agency order be filed "within the time prescribed by law" and that the petition "shall specify the parties seeking review." The requirements of

Rule 15 for obtaining review of an administrative decision thus track those of Federal Rules of Appellate Procedure 3 and 4 for obtaining review of a district court decision.

In *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2407 (1988), this Court held that the failure to name a party in a notice of appeal "constitutes a failure of that party to appeal." There, as the result of a clerical error, the notice of appeal omitted a party's name. Characterizing Appellate Rules 3 and 4 as establishing a "single jurisdictional threshold" (*id.* at 2408), the Court held that the failure to name a party in a notice of appeal or to amend the notice within the time for filing an appeal is more than "excusable 'informality'" (*id.* at 2407). Rather, it deprives the court of appeals of jurisdiction over the unnamed parties (*id.* at 2407-2409).

Petitioners do not challenge the court of appeals' conclusion that *Torres*, which addressed the mandates of Appellate Rules 3 and 4, equally applies to the identical jurisdictional requirement in Appellate Rule 15 that the petition specify the party seeking review. Nor do petitioners contest that since Anna Kowaleski, the only named petitioner for review, did not survive her husband, she has no entitlement to benefits and thus no cognizable interest in the claim. See 20 C.F.R. 725.201 (1988) (providing that benefits are payable to the miner or, if the miner is deceased, to certain specified survivors). Finally, it is undisputed that the motion to substitute the miner's executor for Anna Kowaleski was filed well after "the time prescribed by law." Section 422(a) of the Black Lung Benefits Act of 1972, 30 U.S.C. 932(a) (1982 & Supp. V 1987), incorporating Section 21(c) of the Longshore and Harbor Workers' Compensation

Act, 33 U.S.C. 921(c), requires that a petition for review of an order of the Benefits Review Board be filed in the court of appeals within 60 days after the issuance of that order.[1] In this case, the motion was filed on June 12, 1989, almost a year after the decision of the Benefits Review Board on August 31, 1988.

a. Nevertheless, petitioners assert (Pet. 13) that they filed the "functional equivalent" of a notice of appeal because the notice "named or otherwise designated [the appellant], however inartfully" or contained "some designation that gives fair notice of the specific individual or entity seeking to appeal." *Ibid.* (citing *Torres*, 108 S. Ct. at 2409). But while this court in *Torres* recognized that a litigant need only comply with the "functional equivalent" of what Appellate Rules 3 and 4 require, it established that a party who is not named or otherwise designated as the appellant in the notice has not filed the functional equivalent of a notice of appeal. 108 S. Ct. at 2409. Thus, the Court ruled that the use of the phrase "*et al.*" in the notice did not give fair notice of the party seeking to appeal. *Ibid.* Similarly here, although the petition for review indicated (erroneously) that Anna Kowaleski was the widow of Peter Kowaleski, it did not suggest that review was being sought on his behalf.

Indeed, the Benefits Review Board's understandable assumption that Anna Kowaleski was alive and had appealed the denial of benefits belies any suggestion that the designation in the petition for review

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[1] See *Brown* v. *Director, OWCP*, 864 F.2d 120 (11th Cir. 1989) (60-day appeal period jurisdictional); *Mussatto* v. *Director, OWCP*, 855 F.2d 513 (8th Cir. 1988) (same); *Danko* v. *Director, OWCP*, 846 F.2d 366 (6th Cir. 1988) (same).

fairly indicated that the executor of the estate of Peter Kowaleski was seeking review. It cannot be said that the notice given here met the specificity requirement of the Federal Rules of Appellate Procedure "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 108 S. Ct. at 2409.[2] The courts thus apply a bright-line test requiring that the notice of appeal clearly specify which of the parties is taking an appeal, thus "avoid[ing] the need to determine which parties are actually before the court long after the notice of appeal has been filed." See, *e.g.*, *Farley Transp. Co.* v. *Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1369 (9th Cir. 1985).[3]

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[2] The courts of appeals that have examined the issue in light of *Torres* have correctly rejected the notion that dismissal is appropriate only where the appellee might have been misled by the omission. See, *e.g.*, *In re Woosley*, 855 F.2d 687, 688 (10th Cir. 1988) (rejecting harmless error analysis in dismissing contempt appeal of attorneys taken in name of client); see also *Rogers* v. *National Union Fire Ins. Co.*, 864 F.2d 557, 559 (7th Cir. 1988) (finding naming requirement in Rule 3(c) jurisdictional and inflexible); *Allen Archery, Inc.* v. *Precision Shooting Equipment*, 857 F.2d 1176, 1177 (7th Cir. 1988) (recognizing that *Torres* changed the law of the circuit by requiring "punctilious, literal, and exact compliance" with specificity requirement).

[3] The cases that petitioners cite (Pet. 13 n.11) are not to the contrary; in each case the notice of appeal did specify the parties taking the appeal. See *King* v. *Otasco, Inc.*, 861 F.2d 438, 442-443 (5th Cir. 1988) (no lack of jurisdiction where appellant did not omit his name from notice of appeal but merely failed to designate all capacities in which he brought suit); *Ford* v. *Nicks*, 866 F.2d 865, 869-870 (6th Cir. 1989) (use of "*et al.*" was sufficient to perfect appeal for both parties because body of notice of appeal indicated that both plaintiffs were appealing); *Pope* v. *Mississippi Real Estate*

b. Petitioners also erroneously argue (Pet. 17-18) that the court of appeals should have substituted the miner's executor for Anna Kowaleski pursuant to Appellate Rule 2 or 28 U.S.C. 1653. In *Torres*, this Court rejected the suggestion that Appellate Rule 2, which gives the courts power to suspend the requirements of the Appellate Rules, can be used to avoid the jurisdictional requirement that a notice of appeal specify the party taking the appeal. Rather, the Court noted that Appellate Rule 26(b) acts as a limitation on this broad grant of equitable discretion by providing that appellate courts "may not enlarge the time for filing a notice of appeal." Fed. R. App. P. 26(b), *Torres*, 108 S. Ct. at 2407-2408. Appellate courts similarly may not enlarge the time for filing a petition for review of an agency order. Fed. R. App. P. 26(b).

Nor does 28 U.S.C. 1653, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," permit a different result. The purpose of Section 1653 is to allow amendments of defective *allegations* of jurisdiction, not to provide a remedy for defective jurisdiction itself.[4] The court of appeals

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Comm'n, 872 F.2d 127, 129 (5th Cir. 1989) (same); *Arnow* v. *United States Nuclear Regulatory Comm'n*, 868 F.2d 223, 225 n.1 (7th Cir. 1989) (exhibit setting forth full names of every party, which was attached to and specifically referred to in notice of appeal, was sufficient to serve as notice that those parties were appealing).

[4] Compare, *e.g.*, *McCurdy* v. *Greyhound Corp.*, 346 F.2d 224, 225 n.1 (3d Cir. 1965) (Section 1653 permits amendment to cure defective allegation of corporate party's principal place of business), with, *e.g.*, *Field* v. *Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980) (since diversity jurisdiction is to be determined by the citizenship of the parties at the time

dismissed this case for lack of jurisdiction not because the statement of jurisdiction was technically defective but because the real party in interest had not filed a timely petition for review or a timely motion to amend.[5]

2. Petitioner Lesho argues (Pet. 10-12) that the court of appeals denied him due process of law by ordering that costs—in the amount of $76.20—be taxed against him personally without giving him "pre-sanction notice and an opportunity to be heard." The assertion is without merit.

First, the court did not tax costs against Lesho as a sanction in this case. Rather, the court of appeals imposed costs pursuant to Appellate Rule 39(a), which requires taxation of costs against the appellant if an appeal is dismissed "unless otherwise agreed by the parties or ordered by the court."[6] In ordering that "[c]osts will be taxed against James Lesho, counsel for the nominal appellant" (Pet. App. 12a), the court indicated that Lesho was being taxed

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the action is commenced, Section 1653 does not permit the later substitution of a diverse representative of an estate for a non-diverse representative).

[5] Petitioners also assert (Pet. 15-16) that the court of appeals should have substituted the executor of the estate of Peter Kowaleski for Anna Kowaleski under Fed. R. App. P. 43(a). As the court of appeals noted, however, a party is substituted under Appellate Rule 43(a) only as the personal representative of a deceased party. Pet. App. 11a; *id.* at 10a-11a & n.4; Fed. R. App. P. 43(a). Thus, if the executor of the estate of Peter Kowaleski had been substituted here, it could have been only as the representative of Anna Kowaleski. See Pet. App. 11a n.4. Since that party has no real interest in the case, the substitution would be futile.

[6] Thus, the cases cited by petitioner (Pet. 11, 12 n.10), which involve imposition of sanctions and not taxation of costs under Rule 39, are not on point.

because, under the peculiar facts of the case, he effectively stood in the place of the appellant. There was, in fact, no appellant in the case against whom the court could otherwise assess costs. See, *e.g.*, *Hafter* v. *Farkas*, 498 F.2d 587, 591 (2d Cir. 1974) (costs assessed against lawyer where appeal taken without consent of client).

Second, the manner in which the court assessed costs in this case is consistent with the standard practice of the federal appellate courts under Appellate Rule 39 and provided Lesho all the process to which he was due. Pursuant to this rule, the prevailing party "bec[omes] entitled to an award of costs as a matter of course, save only to the extent that the court might direct otherwise." *Saunders* v. *Washington Metropolitan Area Transit Authority*, 505 F.2d 331, 333 (D.C. Cir. 1974). Appellate Rule 39(d) specifically requires a party who desires to be reimbursed for costs to file an itemized and verified bill of costs and provides that objections to the bill of costs be filed within ten days thereof. After the court of appeals ordered that the government's costs be taxed against Lesho, the Department of Labor filed a bill of costs with the court and served counsel with a copy. Lesho, like any individual against whom Rule 39 costs are claimed, could have objected to the $76.20 in claimed costs at that time, but did not do so. Cf. *United States* v. *Nesglo, Inc.*, 744 F.2d 887, 890 (1st Cir. 1984) (hearing not required prior to award of attorneys' fees and costs for frivolous litigation where appellants did not respond to motion for fees and costs and request hearing).

Finally, although Lesho asserts that he was not given an opportunity to object to the court's assessment of costs against him, it is doubtful that he would have profited from any such opportunity. While the court of appeals did not give advance no-

tice of its intention to tax costs directly against Lesho, it did give him the opportunity to argue why the case should not be dismissed for lack of a real party in interest. Lesho did not respond to this directly, but instead simply filed a motion for substitution of parties. Given the standard allocation of costs pursuant to Rule 39, Lesho should have known that his failure to name a real party in interest in a notice of appeal could lead to the assessment of costs against him directly. As this Court has held, the process that is "due" a party "turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link* v. *Wabash R.R.*, 370 U.S. 626, 632 (1962). As the Court found in that case, "[t]he circumstances here were such as to dispense with the necessity for advance notice and hearing." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

APPENDIX

U.S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 87-129 BLA
OWCP No. 178-03-0335

ANNA KOWALESKI (Widow of PETER KOWALESKI),
CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT

Appeal of the Decision and Order of
Robert J. Brissenden, Administrative Law Judge,
United States Department of Labor

DECISION and ORDER

[Filed Aug. 31, 1988]

Before: BROWN and DOLDER, Administrative Appeals Judges, and FEIRTAG, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. IV 1986).

DOLDER, Administrative Appeals Judge:

Claimant, the miner's widow,[1] appeals the Decision and Order of Administrative Law Judge Robert J. Brissenden denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that claimant had established twelve years of coal mine employment and the parties had stipulated to the existence of pneumoconiosis pursuant to 20 C.F.R. § 727.203 (a)(1). The administrative law judge, however, denied benefits because he found the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. § 727.203 (b)(2), (b)(3) and (b)(4). The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. Claimant, on appeal, contends that the administrative law judge erred in finding rebuttal pursuant to Section 727.203(b).[2] The Director, Office of Workers' Compensation Programs, has filed a response advocating affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the

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[1] The miner filed for benefits on March 6, 1978. DX-1. The miner died on March 1, 1985 and the miner's widow is pursuing the miner's claim for benefits.

[2] Since claimant fails to challenge the administrative law judge's finding of no entitlement under Part 410, this finding is affirmed. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law, they are binding upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

Claimant first challenges the administrative law judge's finding of rebuttal pursuant to subsection (b)(2). The administrative law judge, after considering the relevant evidence of record, found that the miner was not totally disabled by a respiratory or pulmonary impairment at the time of death and therefore concluded that rebuttal was established pursuant to subsection (b)(2). Subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit held in *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986) that in order to establish rebuttal under subsection (b)(2), it must be shown that the miner is not disabled for whatever reason. A showing that the miner is not disabled for pulmonary or respiratory reasons is not sufficient to establish rebuttal under subsection (b)(2). Since this case arises within the Third Circuit, and the administrative law judge considered only whether the miner was disabled from a pulmonary or respiratory standpoint, the administrative law judge's finding of rebuttal pursuant to subsection (b)(2) cannot be affirmed. *See Kertesz, supra.*

Claimant also argues that the administrative law judge in concluding that the interim presumption was rebutted pursuant to subsection (b)(3), erroneously found Dr. Karlavage's opinion to be of little probative value. We disagree. The administrative law judge properly accorded greater weight to the opinion of Dr. Aquilina over that of Dr. Karlavage because Dr. Aquilina's report was better supported by the objective evidence of record and was corrobo-

rated by the remaining medical reports of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's determination, based on Dr. Aquilina's report and the remaining medical evidence of record, that the presumption was rebutted pursuant to subsection (b)(3) is therefore affirmed. *See Carozza v. United States Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); *Bernardo v. Director, OWCP*, 790 F.2d 350, 9 BLR 2-26 (3d Cir. 1986). Furthermore, the administrative law judge's finding of rebuttal precludes entitlement under 20 C.F.R. Part 718. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). *See generally Kiewlak v. Director, OWCP*, 11 BLR 1-34 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Howell v. Westmoreland*, 9 BLR 1-61 (1986).[3]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

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[3] Although claimant established invocation pursuant to subsection (a)(1), we find the administartive law judge's determination of rebuttal pursuant to subsection (b)(4) to be harmless error in light of our affirmance of rebuttal pursuant to subsection (b)(3). *See Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 435 n.26, 11 BLR 2-1, 9 n.26 (1987); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988); *Tucker v. Consolidated Coal Co.*, 6 BLR 1-720 (1983). Additionally, under the Board's recent decision in *Whiteman v. Boyle Land and Fuel Coal Co.*, 11 BLR 1-99 (1988) (*en banc*) (McGranery and Brown, JJ., dissenting), claimant is not entitled to benefits under 20 C.F.R. § 410.490.

BROWN, Administrative Appeals Judge, and FEIRTAG, Administrative Law Judge, concurring:

In light of the decision of the United States Court of Appeals for the Third Circuit in *Halon v. Director, OWCP*, 713 F.2d 21, 5 BLR 2-115 (3d Cir. 1983), we believe that the claimant should be awarded benefits under 20 C.F.R. § 410.490. We shall abide, however, by the Board's decision in *Whiteman v. Boyle Land and Fuel Coal Co.*, 11 BLR 1-99 (1988) (*en banc*) (McGranery and Brown, JJ., dissenting), holding Section 410.490 inapplicable to Part C claims.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Eric Feirtag
ERIC FEIRTAG
Administrative Law Judge

Dated this 31st day of August 1988

U.S. DEPARTMENT OF LABOR

Date Issued: Dec. 11, 1986

Case No. 84-BLA-4694

OWCP No. 170-03-0335

IN THE MATTER OF

ANNA KOWALESKI, Widow of
PETER KOWALESKI, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, RESPONDENT

Before: ROBERT J. BRISSENDEN
Administrative Law Judge

DECISION AND ORDER—DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.* ("the Act"). In accordance with the Act and regulations issued thereunder, this case was referred by the Director, Office of Workers' Compensation Programs, to the Office of Administrative Law Judges for formal hearing.

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis, or to survivors of persons who were so totally disabled at the time of their death, or whose death was due to pneumoconiosis.

A formal hearing was held before the undersigned Administrative Law Judge on August 12, 1986, at Scranton, Pennsylvania, at which time the parties were afforded full opportunity to present evidence and argument as provided in the Act and regulations issued thereunder set out in Title 20, Code of Federal Regulations, Part 725 and 727.[1]

The issues are:

1. Length of coal mine employment.
2. Whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner was totally disabled.

Findings of Fact and Conclusions of Law

Background

Claimant, who is deceased, was born on October 21, 1915, and had eight grades of education. The fact that he was a coal miner within the meaning of the Act is not in issue, but the number of years he so worked is in issue, as discussed below. He died in a veterans' hospital on March 1, 1985.

The fact that the deceased's wife, Anna, is his sole dependent for purposes of augmentation of benefits under the Act, is not in dispute (DX-17, 18).

This claim was filed on March 6, 1978 (DX-1). It was administratively denied on January 25, 1980 (DX-34), and was denied after review of additional

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[1] Cited provisions herein refer to sections of that Title. The following abbreviations are used: Director's, Claimant's, and Employer's Exhibits—DX, CX, and EX, respectively; Transcript, TR.

Counsel for the Director was given 15 days post-trial to submit case authority, but no submission was received.

information that had been submitted, on September 23, 1980 (DX-35).

This claim is adjudicated pursuant to the provisions of 20 C.F.R. Part 727, based upon the filing date and the length of coal mine employment, as discussed later.

Length of Coal Mine Employment

There is no objective documentary evidence relative to this issue. However, there is quite a lot of documentary material that may be, and is, considered. Claimant filed sworn and unsworn statements (DX-3 & 4), wherein he listed coal mine employment as a laborer at three coal mines from 1925 to 1938. That information is supported in part by written statements of friends and co-workers (DX-7, 9, 11, 13). Other written statements in the record are sympathetic, but of little, if any, assistance (DX-6, 8, 10, 12, 14, 15). There is no Social Security report of record. Giving the deceased the benefit of all doubt, I find that he had 12 years of coal mine employment, as he has maintained over the years.

Disability Due to Pneumoconiosis

The Act provides benefits to persons who are totally disabled due to pneumoconiosis. Section 727.203(a) of the regulations establishes a rebuttable "interim" presumption, where the miner has engaged in coal mine employment for at least 10 years, that the miner is totally disabled due to pneumoconiosis arising from his coal mine employment, if he meets any one of the criteria set forth in subsections (a)(1) through (a)(4) of that section. Since Claimant worked as a miner for over 10 years, he will be eligible for the presumption if he meets the appropriate criteria.

The presumption is invoked where x-ray evidence establishes the existence of pneumoconiosis. See §§ 727.203(a)(1) and 410.428. The Director did not place the existence of pneumoconiosis in issue, hence the matter is not subjected to analysis. There is some support for the Director's action in DX-29 (1/1 read by Dr. Mathur, a "B" reader) and DX-32 (1/0 p read by Dr. Conrad), but several x-ray interpretations, including the most recent one of May 17, 1983 (CX-4), found no pneumoconiosis. Further, no pneumoconiosis was found in the autopsy report (C-7) or a biopsy report following autopsy (DX-45). In view of the Director's acknowledgment that the deceased had pneumoconiosis, the presumption must be invoked. However, if he did have pneumoconiosis, it was of a mild nature, in view of the record.

Ventilatory Studies

The presumption also may be invoked if ventilatory studies establish the existence of a chronic respiratory or pulmonary disease (§ 727.203(a)(2)). In order to invoke the presumption, these studies must be both "qualifying" and "conforming." A qualifying study is a study which produces forced expiratory volume in one second (FEV_1) and maximum voluntary ventilation (MVV) values which are equal to, or less than, the values set out in 20 C.F.R. § 727.203(a)(2). In order to be considered conforming, the study must meet the quality standards set out in 20 C.F.R. § 410.430. The following ventilatory studies are of record:

Date	Exh.	Doctor	Ht.	FEV_1	Reg.	MVV	Reg.	Cooperation
5/12/78	DX-19	Hospital	70"	2.98	2.5	104.2	100	Good
1/30/80	DX-80	Karlavage	71"	1.90	2.6	70.04	104	Good
3/10/83	DX-22	Mathur	71"	2.19	2.6	111	104	Satisfactory
5/17/83	CX-4	Aquilina	71"	3.59	2.6	142.20	104	Excellent

The study of May 12, 1978, did not produce values within regulatory limits.

The test of January 30, 1980, produced values that qualify under the regulations, but the test was found not to be acceptable by Dr. Leon Cander, a highly qualified Department of Labor consultant because "none of the FEV tracings indicate maximum effort" (DX-21).

The study of March 10, 1983, did not produce qualifying values because of the high MVV, but in any event, this test was considered by Dr. Cander to be not acceptable because "Three FEV tracings representing maximum effort are not available. The MVV is acceptable" (DX-23).

The study of May 17, 1983, not only is the most recent one—it produced the best values of all tests, even those of several years earlier, which values are well above qualifying figures and were obtained with "excellent" cooperation.

The presumption of subsection (a)(2) is not invoked.

Blood Gas Studies

The presumption may also be invoked by blood gas studies which demonstrate an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values equal to, or below, those set out in the chart in 20 C.F.R. § 727.203(a)(3). The following studies are of record:

Date	Exhibit	PCO_2	Observed PO_2	Regulation PO_2
12/19/79	DX-27	34.1	106	66
05/17/83	CX-4	35	86	65

Neither of these tests produced qualifying values, and the presumption of subsection (a)(3) is not invoked.

The presumption also may be invoked under 20 C.F.R. § 727.203(a)(4) on the basis of other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, which demonstrates the existence of a totally disabling respiratory or pulmonary impairment.

There is a note in the record on Dr. Karlavage's memo paper which states "Pt has been examined on 1/11/79. Pt has COPD & anthrasilicosis." That statement is supported by no objective evidence or explanation, and is given no weight (DX-24).

Dr. B. S. Berley examined the deceased on May 12, 1978 (DX-25). Based upon work and medical histories, and physical examination, Dr. Berley concluded "Insufficient evidence to warrant diagnosis of pneumoconiosis." No impairment was noted.

Dr. D. T. Scott examined the deceased on December 19, 1978 (DX-26). Based upon work and medical histories, and physical examination, Dr. Scott noted "no impairment." He diagnosed "Normal PE. anthracosilicosis by history," related to coal mining by history.

Dr. Karlavage stated in an undated document not addressed to any person, that he had seen the deceased on four separate occasions in his office, for shortness of breath and morning cough (CX-5). Dr. Karlvage stated that, based upon physical examination, work and medical histories and, Dr. Mathur's x-ray reading of 1/1 p, as well as pulmonary function tests of March 10, 1983 (discussed above), he was of the opinion that the deceased had pneumoconiosis and was totally disabled from doing coal mine work.

Dr. Charles Aquilina addressed a letter to Claimant's attorney on May 18, 1983 (CX-4). Dr. Aqui-

lina stated that he first saw Mr. Kowaleski in May 1983 on the chief complaint of shortness of breath. Based upon work and medical histories, physical examination, chest x-ray (ILO classification o), blood gas study (normal) and pulmonary function study (normal), Dr. Aquilina concluded, ". . . the possibility of this man being completely and totally disabled on the basis of his pulmonary disease is remote indeed."

CX-6 is a Veterans Administration report covering the deceased's last hospitalization and death. Chest x-rays of January 8, 1985 and January 15, 1985, were "normal." Diagnoses were non-Hodgkins Lymphoma, Adenocarcinoma of the prostrate gland, and Pancytopenia with sepsis due to radiation therapy and chemotherapy.

CX-7 contains the deceased's autopsy reports. It discusses the deceased's lengthy bout with lymphoma (seven years), and included in the diagnoses, anthracosis of hilar lymph nodes, among other diagnoses not relevant herein. It is stated "the immediate cause of death cannot be determined from the autopsy findings."

DX-45 is a biopsy report dated July 23, 1986, and signed by Dr. Richard Naeye. He examined four slides of lung tissue, and two of lymph nodes. Interpretation in pertinent part was no pneumoconiosis, and it is stated "Since coal worker's pneumoconiosis is absent, it could not have contributed in any way to this man's death."

In summary, Dr. Berley, Dr. Scott, Dr. Aquilina, a Veterans Administration Hospital and Dr. Naeye, all examined the deceased or his tissue, without finding total disability or death due to a respiratory or pulmonary impairment. Only Dr. Karlavage differs,

and in the face of overwhelming evidence contrary to his opinion, his opinion is not of weight.

The presumption of subsection (a)(4) is not invoked.

Rebuttal

As discussed above, the presumption of subsection (a)(1) stands alone, and that only because the existence of pneumoconiosis was not placed in issue. However, even though the rebuttal may be inadvertent, it exists. Several x-rays were read as negative, and more important, the most recent one was read as negative, albeit by a non-certified reader. Of even greater weight is the biopsy report. *Kimick v. National Mines Corp.*, 2 BLR 1-221 (1979). Reviewing all the evidence, it is clear that the deceased did not have pneumoconiosis and rebuttal is shown under § 727.203(b)(4).

So far as subsections (b)(2) and (b)(3) are concerned, Dr. Aquilina's report is the most detailed and complete one of record, and he was most emphatic that the deceased was not totally disabled by any respiratory or pulmonary impairment. That report is firmly supported by objective testimony, and has the further support of Drs. Berley, Scott, and Naeye, and the Veterans Administration. As noted, the objective record of pulmonary function tests and blood gas tests do not support a finding of pulmonary or respiratory disability. Rebuttal is well established under subsections (b)(2) and (3).

I find that the deceased was not disabled in life because of any respiratory or pulmonary impairment, and did not die because of pneumoconiosis or any such impairment.

Entitlement

Part 410

Claimant is entitled to have his claim considered under the regulations at 20 C.F.R. § 410, *et seq.*, and § 828.203(d). *Muncie v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). After considering this claim under the applicable sections of Parts 727 and 410, I conclude that the evidence of record does not prove that the deceased suffered from a totally disabling respiratory or pulmonary impairment. Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fees to the Claimant for representative services rendered to him in pursuit of his claim.

ORDER

The claim of Peter Kowaleski for benefits under the Act is denied.

/s/ Robert J. Brissenden
ROBERT J. BRISSENDEN
Administrative Law Judge

RJB:scm

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, Suite 757, Washington, D.C. 20036.

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